

The Environmental Council of the States
Subcommittee on Water Resources and Environment
Hearing on EPA Mining Policies: Assault on Appalachian Jobs

Summary:

States object to US Environmental Protection Agency's (EPA) practice of combining "interim guidance" with "objection authority" which is being used for Clean Water Act requirements associated with mountain top removal mining. There are many problems with this new technique, not the least of which is that it forces state environmental agencies to violate either federal law or their own state laws. States believe EPA's practice is contrary to the Administrative Procedures Act and is bad public policy. By using "interim" guidance, EPA insulates itself from court review because courts routinely reject cases that are filed based on interim actions by saying that the action is not final. Fortunately, EPA can easily remedy our objection by finalizing its guidance and making it judicially reviewable.

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Testimony:

I am testifying on behalf of the leaders of the state and territorial environmental agencies that are the members of the Environmental Council of the States (ECOS). I am the current Secretary-Treasurer of ECOS, and the director of Arkansas' Department of Environmental Quality.

The reason I am testifying is to let this committee know that the states and ECOS are concerned about the manner in which the US Environmental Protection Agency (EPA) is combining "interim guidance" with its "objection authority" powers. This combination creates a situation in which EPA can require a state to insert virtually any provisions EPA wants into a permit, without the benefits of the due process procedures of the Administrative Procedures Act (APA), such as public comment and judicial review. This practice is unwelcome and is potentially dangerous. It obviously thwarts the cooperative procedures that the APA was designed to foster. Fortunately, from the states' point of view, the solution is simple and one which we have often expressed to EPA: finalize your guidance before you ask states and the regulated community to implement it.

The states' environmental agencies operate nearly all of the permitting, inspections, enforcement, monitoring, and data collection, (and some of the standard setting as well) on behalf of EPA, through the system commonly called "delegation." As of April 2011, EPA has delegated to the states 50 of the 50 state air programs, 49 of the 50 state drinking water programs, 46 of the 50 state water permitting programs, and 48 of the 50 hazardous waste programs¹. States also operate many other smaller programs on behalf of EPA, such as radon, lead abatement, beaches, pesticides, etc.

The states' relationship with EPA is often termed "co-regulator." This is because EPA and the states share the responsibility of putting the nation's environmental laws into practice. Through our delegated programs the states are the primary regulators in permitting and enforcement actions, with EPA exercising oversight to insure that the states are correctly and consistently applying the nation's environmental laws.

The usual way EPA conducts its role is to issue rules to carry out the federal law. It may also issue guidance to assist the states and regulated entities in the implementation and interpretation of those rules. EPA also may (and does) review state-issued permits and may, under the Clean Water Act (CWA or "the Act"), "object" to a state-issued permit that it believes does not conform to EPA's interpretation of the Act. This latter action is referred to as "objection authority."²

ECOS and the states have no general concern about the use of "guidance" or "objection authority." EPA has issued guidance for many years, and so do most states. Guidance that is poorly crafted, or exceeds the agency's authority has always been dealt with on a case by case basis. Also, EPA routinely includes disclaimers on its guidance documents reassuring the states and the regulated community that the guidance does not impose legally binding requirements.³ The CWA specifically allows EPA to use objection authority in the permitting process⁴ and states do not object to the use of this

¹ *Delegation by Environmental Act*, ECOS, November 2010.

http://www.ecos.org/section/states/enviro_actlist

² States are notified and given a fixed time to change a permit's "conditions" (i.e., requirements) in order to comply with EPA's objection. If a state is unable or unwilling to change the permit, EPA may (and does) take control of the permit and the state-issued permit is no longer in effect. EPA may then issue the permit with the terms it seeks, or hold it for further study. See footnote 4 for details.

³ *Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Policy Act, and the Environmental Justice Executive Order*. (April 1, 2010). "The CWA and NEPA provisions and regulations described in this document contain legally binding requirements. **This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the U.S. Army Corps of Engineers (Corps), the States, or the regulated community**, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular permit will be based on the applicable statutes, regulations, case-specific facts and circumstances, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law." (emphasis added)

⁴ Clean Water Act, Section 402 (d)(2) "if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit

power in principle. Although the states do not necessarily have a problem with either the use of “guidance” or the use of “objection authority” as separate, non-connected tools, mandating the use of guidance through the exercise of objection authority creates a binding final agency action without benefit of the due process requirements of the Administrative Procedures Act.

Although it may choose to do so, the EPA is not required to publish non-binding guidance nor is it required to accept public comments on such guidance. Therefore, the EPA may choose to issue interim guidance and expect full implementation in the permitting process regardless of the disclaimer language issued with the guidance or the fact that the guidance has not been finalized. Guidance, by the way, is seldom reviewed by the Office of Management and Budget and so is usually issued directly from the agency without further executive oversight.

EPA produces a rule in a similar fashion, only with many more steps and definitely with public comment opportunities. Although EPA will readily admit that it cannot, in theory, compel compliance with guidance -final or otherwise - it is a clear matter of law that it cannot mandate compliance with a rule until it is “final” and published as such in the Federal Register.

ECOS does not believe that EPA has ever attempted to require states to implement “interim guidance” until recently. No state can implement interim guidance for the following two reasons: 1) a state may have a law that says their rules cannot be more stringent than the federal government’s rule. Since an “interim guidance” is not final, it is always interpreted within a state as “not yet in effect” and so the state cannot implement it. The second case is: 2) a state without such a stringency law would instead have to issue the guidance itself. Since EPA never finished an “interim” guidance, the state would find itself defending a proposal that even EPA had not decided to complete. The justifications for such an action within a state would be thin. Even if a state decided to proceed, it would have to follow its own administrative procedures for issuing rules and it could not implement such guidance legally until the state had completed that process.

Requiring states to implement interim guidance puts each state in the position of deciding whether it will break federal law or state law. At the very least, this should be a good enough reason why a federal agency should never ask a state to implement something that is not final. However, the problem for states does not end with this dilemma.

EPA’s regular use of its “objection authority” contributes to the marginalization of a state-delegated program. ECOS believes that the “objection authority” was intended to be used rarely and to prevent cases which were not routine – not as a tool to conduct micromanagement of a state program. In fact, the objection authority power has been

under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.”

rarely used, although it is difficult to obtain data on its frequency. We suggest the Committee ask the agency to supply this data. Kentucky environmental agency leaders told ECOS that it could only recall two or three instances of its use since the program had been delegated in the 1970s. By regularly using the objection authority, EPA leaves a state in the position of issuing a permit that has no value (since its likely to face an objection) and therefore a regulated entity is left wondering where to turn to get its permit. Should it approach EPA directly, or continue to work with the state? Furthermore, a regulated entity is left to defend each of its permits separately – the certainty of understanding the permitting process is gone.

Finally, there is the matter of how courts treat any federal action that is not “final.” In short, courts routinely decline to review cases based on a request to rule on a guidance, rule, or action that is not “final.” Because EPA has issued an “interim guidance” we might expect that a court would decline to review it. Courts also refuse to rule on permits that have not yet been issued, since there is no final agency action. So, if EPA objects to a state-issued permit because EPA asserts that the permit does not comply with interim guidance, but then EPA does not act on the permit, no court is likely to review the case. This means that EPA has created a system where it can stop a permit but not be held accountable for its actions in court.

We hope that the committee can see why the issuance of interim guidance which is mandated in fact through the use of objection authority is an unfair and indefensible position in which to place the states and the regulated community, and must not be allowed to continue.